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Office of the Clerk

SUPREME COURT

231 E. STATE CAPITOL
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

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To:

May 10, 1995

Hon. P. Charles Jones
Dane County Circuit Court
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Madison, WI 53709-0001

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Hon. Charles P.
Dykman
Court of Appeals
119 M. L. King Blvd.,
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Madison, WI 53703

(Additional Addresses on Page Two)

You are hereby notified that the Court has entered the following order:

Nos. 95-0778
and 95-1180-W

Santiago v. Leik and Lloren and
State ex rel. Leik and Lloren v.
District IV Court of Appeals
L.C.#87CV5987

Petitions for review and for supervisory writ having been filed on behalf of defendants-appellants-

petitioners, Russell Leik and Jose Lloren, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs;

IT IS FURTHER ORDERED that the petition for supervisory writ is denied, ex parte.

Marilyn L. Graves
Clerk of Supreme Court

Hon. Robert D. Sundby
Court of Appeals
119 M. L. King Blvd., 7th Flr
Madison, WI 53703

Hon. William Eich
Court of Appeals
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J. Denis Moran
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Hon. Margaret J. Vergeront
Court of Appeals
119 M. L. King Blvd., 7th Flr
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Hon. Paul C. Gartzke
Court of Appeals
119 M. L. King Blvd., 7th Flr
Madison, WI 53703

DISTRICT IV

Office of the Clerk

COURT OF APPEALS

OF WISCONSIN

Marilyn L. Graves
Clerk

March 30, 1995

To: Jeff Scott Olson
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Madison, WI 53701

Frank D. Remington
Asst. Attorney General

Judith Coleman Nispel
Trial Court Clerk
Dane Co. Courthouse
(L.C. #87-CV-5987)

Hon. P. Charles Jones
Dane Co. Courthouse

You are hereby notified that the Court entered the following opinion and order:

95-0778 Jaime Santiago v. Russell Leik and Jose Lloren

Before Eich, C.J., Gartzke, P.J. and Sundby, J.

We previously held that the defendants in this appeal have no qualified immunity. Santiago v. Leik, 179 Wis.2d 786, 508 N.W.2d 456 (Ct. App. 1993). We remanded the matter of [sic] the trial court for further proceedings. On remand, the defendants brought various facts to the trial court's decision, on the strength of which the trial court permitted defendants to file a second motion for summary judgment dismissing the complaint on grounds of qualified immunity and that there are no material issues of fact. The defendants have appealed

from the order denying their motion for summary judgment, and Santiago has moved to dismiss the appeal on grounds that the defendants should not be permitted to relitigate the issue. Santiago urges haste because he is dying of ALS.

The order denying the motion for summary judgment is not appealable as of right. The order is not final. It does not dispose of the entire matter in litigation as to one or more of the parties. Section 808.03(1), STATS. Barnhill v. Bd. of Regents, 166 Wis.2d 395, 415, 479 N.W.2d 917, 925 (1992), does not hold that an order denying a motion to dismiss a complaint on summary judgment on qualified immunity grounds is a final order. As the Barnhill court noted, that is the federal rule. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). The Barnhill court dealt with the issue of qualified immunity after the case had been tried on the merits, exercising its "law-making function." Barnhill, 166 Wis.2d at 416, 417, 479 N.W.2d at 925.[1] Our supreme court has never departed from the final order rule, even when double jeopardy has been claimed and rejected by the trial court. See State v. Jenich, 94 Wis.2d 74, 97a, 288 N.W.2d 114, 117 (1980).

Because the order denying the defendants' motion to dismiss the complaint is not final, defendants' appeal must be dismissed. On occasion, we have treated appeals from nonfinal orders as petitions for leave to appeal, granted the petitions and dealt with the merits. We decline to do so here.

The federal courts have noted that defendant may use sequential Forsyth appeals of pretrial rulings on

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[1] Burkes v. Klauser, 185 Wis.2d 309, 517 N.W.2d 503 (1994) is also not to the contrary. That appeal commenced with a petition to this court for leave to appeal, which we granted.

qualified immunity to Santiago's detriment. For that reason, the right to qualified immunity has been held waivable. See discussion in Yates v. City of Cleveland, 941 F.2d 444, 448 (6th Cir. 1991).

Santiago's claims relate to events occurring between October 20 and up to November 20, 1987. See Santiago v. Leik, 179 Wis.2d 789, 508 N.W.2d at 457. We decided the first appeal in the fall of 1993. 179 Wis.2d at 786, 508 N.W.2d at 456. Considering Santiago's medical condition, we decline to treat this appeal as a petition for leave to appeal. We therefore remand the matter to the trial court for further proceedings.

IT IS ORDERED that this appeal is dismissed.

Marilyn L. Graves
Clerk of Court of Appeals